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CPA AUSTRALIA LTD v. MANJEET SINGH SANTOKH SINGH

HIGH COURT MALAYA, SHAH ALAM
AKHTAR TAHIR J
[CIVIL SUIT NO: 23NCVC-43-11-2013]
9 OCTOBER 2015

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TORT: *Defamation – Defamatory statements – Publication of impugned statement via social network – Whether postings defamatory in their natural and ordinary meaning – Whether defendant's reasons to publish postings acceptable – Whether defendant's comments attached together with court's grounds of decision to be read conjunctively – Whether publications made maliciously – Whether plaintiff's reputation tarnished due to publication – Defence of fair comment, justification and absolute or qualified privilege – Whether applicable – Whether plaintiff awarded with exemplary damages*

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The plaintiff was an international accounting body incorporated in Australia and had a foreign registered company in Malaysia. The defendant was an accountant and also an ordinary member of both the Australian and Malaysian accounting body. *Vide* this suit, the plaintiff alleged that the defendant posted three publications, *ie*, two in the Facebook accounts and one in the Twitter account with the same contents in the said publications. The posts were in relation to a decision of the High Court where the defendant's claim against the plaintiff for defamation was allowed. The plaintiff argued that the postings which consisted of the grounds of judgment read conjointly with the defendant's caption and comments attached with the grounds was defamatory. Further, the plaintiff contended that the words in the posts showed that the plaintiff had acted maliciously and unprofessionally towards its own members and managed the affairs of its members in an unjust and unreasonable manner where in actual fact, it was argued that the High Court Judge did not make such findings. The defendant, however, submitted that the postings were made to clear his name and he was justified to do so as it was made on fair comment and the High Court decision was accurately reproduced. The issues that arose for consideration were (i) whether the publications made by the defendant *via* social networks were defamatory in their natural and ordinary meaning, or in the alternative, by innuendo; (ii) if the issue in (i) was answered in the affirmative, whether the defendant could rely on the defences of absolute and/or qualified privilege, fair comment and justification; (iii) whether the defendant could rely on s. 11 of the Defamation Act 1957; and (iv) whether the three separate publications were made with malice.

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Held (awarding plaintiff exemplary damages in the sum of RM25,000):

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(1) The onus was on the plaintiff to establish that the impugned statement published by the defendant referred to the plaintiff and that it had the tendency of bearing a defamatory meaning. There must be a publication of the alleged defamatory statement and it was deemed a

publication as soon as it was published to a third person. On the facts, the defendant had published the grounds of judgment together with the defendant's comment in relation to the decision of the High Court *via* social network post. The defendant's impugned post referred to the plaintiff with the intention of clearing his name from the dispute which took place between the plaintiff and the defendant previously. (paras 15 & 16)

(2) The publication of the grounds of the High Court must be read together with the caption and comment attached with the grounds. In its entirety, the posting was defamatory as it invited contempt and odium against the plaintiff in the minds of those who read it, even without reading the court's decision in full. The defendant's deliberate intent to disseminate the caption together with the grounds of judgment showed that the defendant's statement was actuated with malice and was therefore defamatory. Further, the caption was added to create a bad impression in the minds of the reader against the plaintiff even without reading the court's decision. (paras 19, 21, 23 & 24)

(3) The defence of absolute privilege could only be applied if the grounds of judgment was posted without the caption. It did not reflect the actual decision of the court when read together with the caption. As for the defence of qualified privilege, the defendant failed to specify as to what was the legal, moral or social duty on him to post such comments. The defendant's reason for publishing the posting was untenable. He had cleared his name the moment the High Court decided in his favour. As such, the defence of absolute or qualified privilege did not apply (*Chew Peng Cheng v. Anthony Teo Tiao Gin*; refd). (paras 28-33)

(4) In order to succeed for the defence of fair comment, the defendant had to establish that (i) the words complained of were comments though they consisted of or included inference of facts; (ii) the comments were on a matter of public interest; and (iii) the comments were based on facts truly stated. They must also be fair and which a fair minded person could honestly make on the facts proved. On the facts, the statement contained in the posting was not a fair comment but was made maliciously to tarnish the reputation of the plaintiff. The defendant also failed to prove the defence of justification (*Tun Datuk Pattingi Haji Abdul-Rahman Ya'kub v. BRE Sdn Bhd & Ors*, foll; *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor*; refd). (paras 35 & 39)

(5) The plaintiff was a reputable company. However, there was no evidence to support that its reputation was in any way tarnished as a result of the posting. There was no reduction in their membership and they were not confronted by any other members who read the post in questioning their integrity or fairness. Further, the evidence of any loss

A suffered by the plaintiff was never adduced before the court. As such, the plaintiff was not entitled to both general and aggravated damages. Instead, a sum of RM25,000 was awarded as exemplary damages to the plaintiff as a form of deterrence against the defendant from repeating his action. (paras 41-44)

B **Case(s) referred to:**

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Chew Peng Cheng v. Anthony Teo Tiao Gin [2008] 8 CLJ 418 HC ***(refd)***

Choo Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

C *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA* ***(refd)***

Tun Datuk Patinggi Hj Abdul Rahman Ya' kub v. BRE Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(foll)***

Legislation referred to:

D Defamation Act 1957, ss. 8, 9, 11

Other source(s) referred to:

Gatley, *"Libel and Slander"*, 6th edn at p 4, para 4

For the plaintiff - Nicholas Lai; (Lim Koon Huan with him); M/s Skrine

For the defendant - Manmohan Singh Kang (Kavimani & Satyanathan with him); E *M/s Kavi & Co*

Reported by Kumitha Abd Majid

JUDGMENT

F **Akhtar Tahir J:**

Introduction

[1] The present suit by the plaintiff against the defendant was centred on the publication of defamatory statements by the defendant against the plaintiff, resulting in a claim for damages by the plaintiff.

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Plaintiff's Salient Facts

[2] The plaintiff is an International Accounting Body incorporated in Australia and is also a foreign registered company in Malaysia.

H **[3]** The plaintiff's claim against the defendant is premised on postings made by the defendant in three publications, namely in two Facebook accounts and a Twitter account with the same content on all the three publications.

[4] On the First Publication, the defendant had created a Facebook I account name "Sunny Sunny", and had on 7 November 2013 published or posted together with an attachment of the Grounds of Judgment of the Kuala Lumpur High Court Civil Suit No. S-22-644-2010 onto his Facebook account together with the following words:

MANJEET SINGH v. CPA AUSTRALIA LTD - Grounds of Judgment of High Court of Malaysia in a case that I filed against CPA Australia. From your own judgment of how they have behaved against me as a member and in the findings of the judge of the malicious manner they damaged my reputation as a professional and as an accountant.

[5] This civil suit No. 22-644-2010 mentioned in the above posting was a decision of the High Court Kuala Lumpur on a successful claim brought by the defendant against the plaintiff also for defamation.

[6] Apart from the Facebook posting above the defendant had also published, posted and attached the same posts to the plaintiff's official Facebook page. This posting however was removed and deleted the next day.

[7] The same posting was also posted and attached on the defendant's Twitter account on 7 November 2013 under the name "SunnySunnyBoyB" which included a link to the post "Just uploaded Grounds Of Decision - *manjeet Singh v. CPA Autralia Ltd* - pdf http://t.co/meOvdypVlu *via* @SCRIBD@CPAAUSTRALIA".

[8] It is the contention of the plaintiff that the postings which consisted of the grounds of judgement read conjointly with the personal statement of the defendant was defamatory as it was *inter alia* intended to undermine and lower the plaintiff in the estimation of the eyes of right thinking people and the public. It was further intentionally made to damage the plaintiff's reputation as a globally recognised professional accounting member based body.

[9] The plaintiff further contended that in their natural and ordinary meaning or, in the alternative by innuendo, the words in the posts were meant and understood to mean among others that the plaintiff had acted maliciously and unprofessionally towards its own members, and manages the affairs of its members in an unjust and unreasonable manner while in actual fact, no such findings was made by the High Court Judge.

[10] In light of the above acts and publications by the defendant, the plaintiff among others claim from the defendant that an injunction order be ordered by the court to permanently remove and to restrain the defendant from further publication of the same and a further relief of general, aggravated and exemplary damages to be awarded to the plaintiff.

The Defendant's Contention

[11] The defendant is an accountant in profession, apart from being an ordinary member of both the Australian and Malaysian Accounting body.

[12] The defendant was all the while not in denial of the publication of the postings as alleged by the plaintiff but contended that the posting were made to clear his name and he is further justified in doing such as it was

made on fair comment and an it was accurate reproduction of the High Court decision.

[13] The defendant further contended that the grounds of judgment post were protected under the purview of absolute privilege as it was published in verbatim and in full text with no additions and omissions and is a fair and accurate publication of what is in effect a public document arising out of proceedings apart from relying on the defence of qualified privileged.

[14] In other words, the defendant as a whole though not denying the said three publications, was always of the view that the postings were justified as he was not only protected under the defence of justifications, absolute and qualified privilege, but the posting was also of fair comment.

Issues To Be Tried

[15] Agreed issues to be tried has been tendered in court and marked as D. The issues are as follows:

a) Whether the three publications made by the defendant *via* social networks are defamatory in their natural and ordinary meaning, or in the alternative, by Innuendo;

b) If the above issue were answered in the affirmative, whether the defendant has sufficiently proven to be able to rely on the defences of absolute and / or qualified privilege, fair comment and justifications;

c) In addition to the above defences, whether the defendant could further rely on s. 11 of the Defamation Act 1957 against the plaintiff's claim; and lastly

d) Whether the three separate publications were made with malice on the part of the defendant.

Findings Of The Court

[16] It is a trite law on defamation as enunciated in the case of *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 that the onus lies on the plaintiff to establish, that the impugned statement that the defendant had published was in fact referred to the plaintiff and that it had got the tendency of bearing a defamatory meaning. There must also be a publication of the alleged defamatory statements and it is deemed a publication as soon as it is published to a third person.

[17] In this case, the issue of publication is not disputed as parties in their agreed facts marked before the court as C, has admitted that the defendant had through three publications *via* the social networks post together with the grounds of judgment, the defendant's comment on the decision of the High Court Judge. Neither was there any dispute on the fact that the impugned post by the defendant was clearly referring to the plaintiff with the intention to clear his name from the dispute that has actually taken place between the plaintiff and the defendant previously.

[18] The only point on elements of Defamation to be satisfied by the plaintiff is whether the said publications are deemed defamatory. A

[19] At this stage, it would be useful to highlight the basic understanding of defamation as envisaged by Gatley on *"Libel and Slander"*, 6th edn at p. 4, para. 4 where it says: B

> There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation of right-thinking members of society generally, 'to cut him off from society,' or 'to expose him to hatred, contempt or ridicule,' is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published. C

Further, at p. 14, para. 31, Gatley says:

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of right-thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency. D

[20] First, considering the postings in its entirety, I agree with the plaintiff's contention that the posting should be red conjunctively ie the publication of the High Court grounds of decision must be read together with the caption and comment attached with the grounds which reads: E

> MANJEET SINGH v. CPA AUSTRALIA LTD- Grounds of Judgment of High Court of Malaysia in a case that I filed against CPA Australia. From your own judgment of how they have behaved against me as a member and in the findings of the judge of the malicious manner they damaged my reputation as a professional and as an accountant. F

[21] In the oft-quoted case of *Choo Foo Choo v. The China Press Berhad* [1999] 1 CLJ 461, Gopal Sri Ram JCA (as he was then) in the Court of Appeal held at 467 that: G

> In my judgment, the test which is to be applied lies in the question: *do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites as affirmative response*, then the words complained of are defamatory. (emphasis added) H

[22] Looking at the posting in its entirety, it is my decision that the posting is defamatory as it invites contempt and odium against the plaintiff in the mind of whoever who reads the posting. The posting creates this effect of contempt and odium against the plaintiff even without the reader reading the court's decision in full. I

[23] In my opinion apart from the bare few who would read the entire court decision, a majority would be influenced merely by reading the caption added in by the defendant.

[24] The defendant's deliberate intent to disseminate the caption together with the grounds of judgement here is a compelling reason to hold the defendant's statement was actuated in malice and was defamatory.

[25] I am further of the opinion the caption was added by the defendant for this very reason to create a bad impression on the minds of the reader against the plaintiff even without having to read the court's decision.

Defences Of Defamation

[26] The next point to consider was whether the defendant could rely on the defences available under the Defamation Act 1957 namely absolute and/ or qualified privileged, fair comments and justifications. The defendant had further submitted that the postings were justified under s. 11 of the said Defamation Act.

Absolute Privilege And/ Or Qualified Privilege

[27] In *Chew Peng Cheng v. Anthony Teo Tiao Gin* [2008] 8 CLJ 418, Hamid Sultan Abu Backer J (as he was then) has laid down the principles and considerations for all the defences in defamation. With respect of the defence of privilege, His Lordship has held at 433:

> As a general rule, privilege can be classified into two types, namely absolute and qualified privilege. Absolute privilege arises in very limited circumstances for some of them are as follows:
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> (i) statements made in Parliament;
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> (ii) reports, papers, votes and proceedings ordered to be published by either House of Parliament;
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> (iii) judicial proceedings;
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> (iv) communication between solicitor and client made in connection with litigation;
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> (v) communication made by one officer of state to another in the course of official duty;
>
> (vi) section 11 of the Defamation Act provides a defence of absolute privilege as regards fair, accurate and contemporaneous reports of judicial proceeding in Malaysia.
>
> It is trite that where the defendant raises the defence of absolute privilege; it is for him to establish the same. (emphasis added)

[28] The defendant is seeking to rely on absolute privilege on the basis that:

> a) The reference of the heading refers in all respects to the findings of the Learned Judge ... (para. 4.1 of Statement of Defence);
>
> b) The defendant was exercising his right and duty "to keep members of the Accounting fraternity well informed not only to his own interest but also of the members of the Accounting fraternity"; and

c) It is protected under s. 11(1) of the Defamation Act 1957 which provides, "a fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bona fide* comment thereon shall be protected ..."

[29] In my finding the defence of absolute privilege could only have been applied if the grounds of judgement were posted with no accompanying caption. Read together with the caption it does not reflect the actual decision of the court.

[30] As for the defence of qualified privileged, Hamid Sultan Abu Backer J (as he was then) in *Chew Peng Cheng* (*supra*) has held at p. 434:

> It is essential for the defence of qualified privilege to succeed; to at least satisfy two criteria's, ie, *one there is a legal, moral or social duty to make the statement on one side. The other is that there is a corresponding interest to receive it. However, if it is spiked with malice, this defence will not be available.* (see *Rajagopal v. Rajan* [1971] 1 LNS 117). (emphasis added)

[31] For this defence to succeed, the defendant must at least specify what is the legal, moral or social duty on the defendant to make such comments? This, the defendant has failed to show in this case. This was not stated either in his defence or in his submissions.

[32] The only point that the defendant has actually emphasised throughout the trial, is that the purpose of the posting was to clear his name.

[33] To me the reason forwarded by the defendant as a reason to publish the posting was untenable. The defendant's name had been cleared the moment the High Court Kuala Lumpur decided in his favour.

[34] Thus, the defence of absolute or qualified privilege did not apply here.

Fair Comment

[35] As a defence in the alternative, the defendant pleaded a defence of fair comment. Section 9 of the Defamation Act provides that:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or rendered to in the words complained are proved.

[36] Richard Malanjum J (as he then was) in the case of *Tun Datuk Patinggi Hj Abdul Rahman Ya' Kub v. BRE Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393 had further emphasised:

A For the defence of fair comment, in order to succeed the following basic elements must be established by the defendants, namely:

(i) that the words complained of are comments, though they may consist of or include inference of facts;

(ii) that the comments are on a matter of public interest; and

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(iii) that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved (see JB Jeyaretnam).

[37] Applying the test of the above case to the present case before me, C it is my decision that the statement contained in the posting was not a fair comment but was made maliciously to tarnish the reputation of the plaintiff. This is clear by just reading the caption at a glance. The defence of fair claim therefore fails.

Justification

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[38] The only other defence that can be argued by the defendant is the defence of justification. Section 8 of the Defamation Act 1957 states as follows:

E In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[39] Further, the Court of Appeal through the case of *Dato' Seri Mohammad Nizar bin Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* F [2014] 3 CLJ 560; [2014] MLJU 262 has elaborated on the defence of justifications as follows:

G In relying on the defence of justification the burden of proof is on the defendant to prove that the allegations made are true or are substantially true. The defendant must prove it on the balance of probabilities, that is, the allegation is more likely than not to be true.

[40] In this case the defendant has clearly failed to prove justification and for the same reasons I have rejected the other defences I also rejected the defence of justification.

H **Decision Of The Court**

[41] Based on the above reasons, I allowed the plaintiff's claim and the only thing needing further consideration was whether there were any damages suffered by the plaintiff as a result of the defamatory statements.

I **[42]** I do not doubt that the plaintiff is a reputable company. Nevertheless, I could not find any evidence to support that its reputation was in any way tarnished as result of the posting. There was no reduction in their membership and they were at no time confronted by any other

members reading the post questioning their integrity or fairness. That evidence of any loss suffered by the plaintiff if any was never brought before the court.

[43] The court is in no position to assume the effect of the posting unless they are facts to support the assumptions.

[44] Based on the above, the plaintiff is not entitled to either general damages nor aggravated damages as prayed.

[45] I however awarded exemplary damages to the amount of RM25,000 to the plaintiff as a form of deterrence against the defendant from repeating his action.

[46] Finally I also awarded the cost of RM50,000 to the plaintiff.